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In The
Supreme Court of the United States
October Term, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

VS.

JAMES R. BRIGGS AND
LOUISA BRIGGS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether a police officer can be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only allegation made against the police officer is that he knew or should have known that the affidavit that he submitted to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed.

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OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 748 F.2d 715, is reproduced in Appendix A, pp. App. 1 - App. 18, in the Petition for Writ of Certiorari. The Judgment of the United States Court of Appeals for the First Circuit is repro-

duced in Appendix D, p. App. 29, in the Petition for Writ of Certiorari.

The unpublished Order of the United States District Court for the District of Rhode Island granting petitioner Malley's Motion for Directed Verdict is reproduced in Appendix B, pp. App. 19 - App. 23, in the Petition for Writ of Certiorari. The Judgment of the United States District Court for the District of Rhode Island is reproduced at page 68 of the Joint Appendix.

The unpublished Opinion and Order of the United States District Court for the District of Rhode Island denying respondents' Motion for a New Trial or, in the Alternative, for Relief from Judgment is reproduced in Appendix C, pp. App. 24-App. 28, in the Petition for Writ of Certiorari.

JURISDICTIONAL GROUNDS

The Judgment of the United States Court of Appeals for the First Circuit was entered on November 19, 1984. The Petition for Writ of Certiorari was filed on April 5, 1985, and was granted on May 28, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

> § 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color, of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

—o—

STATEMENT OF THE CASE

In December of 1980, the Rhode Island State Police were conducting a court-authorized wiretap on the telephone of Paul Driscoll in connection with a narcotics investigation. (J.A. 44.) At that time Paul Driscoll was living with Jaime DeJoira, the daughter of respondents James and Louisa Briggs (J.A. 41.) Mr. and Mrs. Briggs

met Paul in November of 1980 (J.A. 41), and after that time he frequently came to their home for dinner, for visits, and to attend parties. (J.A. 42.)

On the evening of December 19, 1980, Mr. and Mrs. Briggs attended a party at a friend's house. (J.A. 24.) When they returned home at approximately midnight or 12:30 a.m. (J.A. 24, 28), there were four couples in their living room sitting by the fire in the fireplace (J.A. 28, 39): Jaime DeJoira and Paul Driscoll; Sandy, another of the Briggs' daughters, and her fiance, Scott Paul; Carolyn Coleman, the Briggs' niece, and her husband, David; and another unidentified couple. (J.A. 28, 39.) Mr. Briggs believes that he communicated with these couples for "five minutes or so," that he "probably fell asleep" in his chair, that he was "there maybe an hour or so," and that his wife stayed and talked with the couples "[m]aybe five minutes longer" than he did. (J.A. 29.) Mrs. Briggs believes that she stayed with the couples "maybe a total of fifteen minutes." (J.A. 40.)

On December 20, 1980, during the regular monitoring by the State Police of the calls on Paul Driscoll's telephone, Officer Miranda noted on the call log sheet that a call was received by Paul at 5:30 p.m. (J.A. 53-55, 78.) Officer Miranda wrote on the call log sheet that "male party calls Paul states this is Dr. Shogun—General conversation re. a party they went to last night—spot monitored—caller says I can't believe I was token [*sic*] in front of Jimmy Briggs—caller states he passed it to Louisa—caller and Paul talk about another party going down tonight—Paul says Nancy was sitting in his lap rolling her thing—conversation is general—caller says he will pick up Paul at 6:30 tonight to go to the other party."

(J.A. 54-55, 78.) At 5:56 p.m. Officer Lynch noted on the call log sheet that "Scott calls Paul . . . P going to party at Jaimes parents house. Went to one there last night also. Everything u can imagine was going on. Coleman trying to make Louisa (Bungershort) Dave & Carolyn. Going to party. Lot of relatives. . . ." (J.A. 78.)

Pursuant to Rhode Island procedure,[1] petitioner Edward Malley reviewed the logged information regarding these telephone calls to determine if the calls should be considered incriminating calls. (J.A. 58.) At the time of this review, petitioner Malley held the rank of Trooper with the Rhode Island State Police, was assigned to narcotics duty in the Detective Division, and was supervising the wiretap investigation of Paul Driscoll. (J.A. 44-45.) After reviewing the logged information regarding these calls with his partner, Trooper Malley concluded that an incriminating call had been made regarding Mr. and Mrs. Briggs because of the drug terminology used in the first call: "token" indicates smoking marijuana and "rolling

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[1]When the Superior Court of Rhode Island authorizes a particular wiretap on a telephone, the procedure is as follows:

> [C]alls on, to or from that phone are then monitored and logged by the State Police. Calls which are considered to be incriminating by the State Police are reported to the superiors at the State Police. The officer at the State Police in charge of the investigation reviews the calls considered to be incriminating and decides which calls he believes provide the basis for preparing and submitting an affidavit and arrest warrant and District Court Complaint. The officer then prepares the affidavit and the arrest warrant and the District Court complaint. These are submitted to the Judge of the District Court, who reviews both of them and, either signs or refuses to sign both of them.

(J.A. 51-52.)

her thing" indicates rolling a marijuana cigarette. (J.A. 57-58.)

Accordingly, Trooper Malley prepared an Affidavit and Arrest Warrant and a District Court Felony Complaint for both James R. Briggs and Luisa [*sic*] B. Briggs which he presented to Judge John J. Cappelli of the Rhode Island District Court for the Judge's review and either approval or disapproval. (J.A. 45-49, 52, 72-74, 75-77.) In his Complaints, Trooper Malley alleged that Mr. and Mrs. Briggs "did unlawfully conspire" with Paul Driscoll "to violate the uniform controlled substance act of the State of Rhode Island" by having marijuana in their possession. (J.A. 74, 77.) In his affidavits, Trooper Malley set forth the information in his possession regarding the telephone calls concerning Mr. and Mrs. Briggs and his interpretation of the drug terminology in the first call.[2]

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[2]Trooper Malley's Affidavit regarding James R. Briggs states:

Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists [*sic*] and states the following facts on which such belief is founded:

Persuant [*sic*] to court ordered wire intercept . . . .

On December 20, 1980, at 5:30 p.m. an incoming call was received to Paul Driscoll recorded on Reel 7, Side 1, Footage 30-48. This unidentified male calls Paul Driscoll and states, "This is Doctor Shotgun" [*sic*]. General conversation reference to a party they went to last night. Caller states, "I can't believe I was token in front of Jimmy Briggs." Caller states that he passed it to Luisa [*sic*]. Caller and Paul talk about another party going on tonight. Paul says that Nancy was sitting in his lap rolling her thing. On the same date at 5:56 p.m., Reel 7, Footage 48-59. Male subject Scott calls Paul Driscoll. General conversation about a party at Jaime's parents' home. Also, that they went there last night. They are referring to Jaime's

(Continued on following page)

On February 25, 1985, Judge Cappelli signed the District Court Felony Complaints and the Affidavits and Arrest Warrants for Mr. and Mrs. Briggs, indicating on each Arrest Warrant:

> TO ANY AUTHORIZED OFFICER:
>
> Affidavit (and complaint) having been made to me under oath, and as I am satisfied that there is probable cause for the belief therein set forth that grounds for issuing an arrest warrant exists [*sic*], you are hereby commanded to arrest the defendant forthwith and to bring him before a judge of this court without unnecessary delay.

(J.A. 46, 47, 72, 75.)

(Continued from previous page)

> parents' home, that is James and Luisa [*sic*] Briggs. Further, in regard to the conversation at 5:30 p.m. this unidentified male who called himself Doctor Shotgun [*sic*] stated that he was token in front of Jimmy Briggs. In your affiant's experience, he was smoking a marijuana cigarette in front of James Briggs. He then states that he passed it to Luisa [*sic*]. Luisa [*sic*] would be Luisa [*sic*] Briggs. He passed her a marijuana cigarette. Where Paul states that Nancy was sitting on his lap rolling her thing, she was rolling a marijuana cigarette.
>
> Therefore, your affiant requests that an arrest warrant be issued for James R. Briggs, alias John Doe, DOB: [blank]

(J.A. 72-73.)

Trooper Malley's Affidavit regarding Luisa [*sic*] B. Briggs is the same as the Affidavit regarding James R. Briggs, except that the last sentence of the Affidavit regarding Mrs. Briggs reads:

> Therefore, your affiant requests that an arrest warrant be issued for Luisa [*sic*] B. Briggs, alias Jane Doe, DOB: 5/12/28.

(J.A. 75-76.)

Pursuant to these Arrest Warrants, on March 19, 1981, at approximately 5:45 a.m., Mr. and Mrs. Briggs were arrested and taken to the Wickford State Police barracks (J.A. 14-17) where they remained until approximately 2:00 or 2:30 p.m. (J.A. 19.) During their stay at the barracks, they were taken into a large room in which other people who also had been arrested were being held (J.A. 18, 26, 34), including Jaime DeJoira, Paul Driscoll, and David Coleman. (J.A. 25-27, 41.)

At approximately 2:00 or 2:30 p.m., Mr. and Mrs. Briggs travelled by bus with the other arrestees to the West Kingstown Courthouse (J.A. 19, 21), where Mr. Briggs met with his attorney, who had been waiting for him at the Courthouse for a scheduled land transaction. (J.A. 21, 22.) Mr. and Mrs. Briggs were brought into the courtroom for their arraignments and individually came before the Judge and pleaded not guilty. (J.A. 22-23, 38.) After Mr. and Mrs. Briggs signed for their bonds (J.A. 23, 38), they were driven home by Jaime DeJoira's ex-husband. (J.A. 42.) The charges against Mr. and Mrs. Briggs were later dropped, because the grand jury to which the charges were presented returned no true bill against Mr. and Mrs. Briggs. (J.A. 4.)

On December 18, 1981, James and Louisa Briggs filed a complaint, under 42 U.S.C. § 1983, against Edward Malley and the State of Rhode Island in the United States District Court for the District of Rhode Island, alleging that their rights under the Fourth and Fourteenth Amendments had been violated.[3] (J.A. 2-8.) Specifically, Mr.

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[3]Mr. and Mrs. Briggs also alleged pendent state claims of malicious prosecution, defamation, and false imprisonment. (J.A. 5-8.)

and Mrs. Briggs alleged that they were unlawfully arrested and imprisoned because the arrest warrants under which they were arrested were constitutionally deficient in that the affidavits submitted in support of the warrant applications did not set forth sufficient facts to establish probable cause to believe that Mr. and Mrs. Briggs had committed the offense alleged. (J.A. 3-4.) Mr. and Mrs. Briggs alleged that they are entitled to $1,000,000 in compensatory damages and $1,000,000 in punitive damages from Trooper Malley because of this alleged violation of their constitutional rights. (J.A. 4.)

In his answer to this complaint, Trooper Malley asserted: (1) that he has absolute immunity and/or the qualified immunity of good faith from this action; and (2) that the complaint fails to state a claim upon which relief may be granted, in that the facts alleged do not support a claim under 42 U.S.C. § 1983. (J.A. 9)

The case was tried before a jury in February of 1984. (J.A. 12.) At the close of plaintiffs' evidence, defendants Malley and the State of Rhode Island moved for a directed verdict. (Tr. 141.) The trial judge granted the motion as to both defendants. (J.A. 68.) Mr. and Mrs. Briggs filed a Motion for New Trial or, in the Alternative, for Relief from Judgment, which was denied by the trial judge. (J.A. 69, Pet. App. 24.) In ruling in favor of Trooper Malley on both of these motions,[4] the trial judge determined that a policeman who believes the facts in his arrest warrant affidavit to be true and who sub-

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[4]Because Mr. and Mrs. Briggs did not appeal the Judge's ruling in favor of the State of Rhode Island, that ruling is not at issue here and accordingly is not discussed.

mits such an affidavit to a neutral and detached judge for a probable cause determination cannot be held liable under 42 U.S.C. § 1983 for two reasons: (1) such a policeman is immune from liability; and (2) the judge's intermediate decision to issue an arrest warrant breaks the causal chain and insulates such a policeman from liability. (Pet. App. 19-28.)

Mr. and Mrs. Briggs appealed from the judgment in favor of Trooper Malley. The Court of Appeals for the First Circuit reversed the trial judge, deciding that "judicial approval of a warrant cannot act as an absolute bar to the § 1983 liability of the officer who obtained the warrant." *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984) (Pet. App. 16). The court emphasized that § 1983 liability will attach where an officer is " 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause . . . ." *Id.* On the other hand, in those cases in which "the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability." *Id.* Because the Court of Appeals determined that the district court had improperly directed a verdict for Trooper Malley, the court reversed and remanded for a new trial.

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SUMMARY OF ARGUMENT

Petitioners ask this Court to adopt the rule that a police officer cannot be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only alle-

gation made against the police officer is that he knew or should have known that the affidavit that he submitted to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed. This request is based on two alternative grounds.

I. First, a police officer whose only alleged misconduct is that he submitted an allegedly insufficient affidavit to a neutral and detached magistrate in an application for an arrest warrant should be absolutely immune from liability under 42 U.S.C. § 1983. This absolute immunity should be applied to a police officer in this situation because the function that he is performing in this instance is analogous not only to the common law function performed by the prosecuting complainant but also to the common law function performed by the prosecuting attorney in initiating a criminal prosecution. Because both of these functions historically have been accorded absolute immunity, and because the function performed by the police officer in this sitaution is so functionally similar to these immune functions, the police officer should be accorded absolute immunity for his conduct in submitting an allegedly deficit affidavit to a magistrate in an application for an arrest warrant.

The application of absolute immunity to a police officer in this situation also is supported by important policy and interest considerations. Because the police officer who applies for an arrest warrant is involved in a situation that arouses the most intense emotions in the individuals for whom he is seeking the warrant, and because

these feelings are not easily assuaged by the magistrate's decision to issue the arrest warrant, retaliatory litigation is to be expected. It is just because of the explosive nature of police work, however, that the protection offered by absolute immunity is required to allow the police officer to deal fearlessly with the public pressures and emotions involved in his work. On the other hand, providing such absolute immunity to a police officer will not leave allegedly wronged individuals without sufficient protection, for they have all of the protections inherent in the judicial process as well as alternative remedies of criminal prosecution and state tort actions for civil liability in applicable situations.

Moreover, applying absolute immunity to a police officer in this situation will serve the policy reasons inherent in this Court's stated preference for the use of arrest warrants and the established division of functions between magistrates and police officers. The Court has expressed a strong preference for the use of warrants in making arrests because such use of warrants, by providing for magisterial review and independent determination of the existence of probable cause, provides for the maximum protection of an individual's rights. From this principle the Court has acknowledged that there is a division of functions between police officers and magistrates: the police officer's function is primarily one of ferreting out crime, while the magistrate's function is primarily one of determining the existence of probable cause and issuing the appropriate warrants. By applying to a magistrate for approval of his proposed arrest warrant, a police officer is conducting himself exactly as this Court has strongly indicated that it wants him to conduct himself, thereby assuring the maximum protection of individual rights.

The Court of Appeals' decision, however, ignores the Court's preference and policy in this area and requires that the police officer take on the neutral and detached function of the magistrate. Not only must the police officer make an accurate determination of the existence of probable cause before he applies to the magistrate for an arrest warrant, but the police officer must also assume a role even more skilled in evaluating probable cause than the magistrate. Such a policy is completely at odds with the reasoning of this Court, for it ignores the distinct functions of the magistrate and the police officer and in fact tends to discourage officer applications for arrest warrants.

Accordingly, because the function performed by the police officer in this situation historically has been accorded absolute immunity, because the Court of Appeals' rule is so at odds with this Court's policy of preferring and encouraging police officers to seek warrants from neutral and detached magistrates, and because granting absolute immunity to police officers in this situation will support and is entirely consistent with policy considerations stated by this Court, the Court should grant police officers absolute immunity in this situation.

II. Second, a police officer whose only alleged misconduct is that he submitted an allegedly insufficient affidavit to a neutral and detached magistrate in an application for an arrest warrant has acted in an objectively reasonable manner and is entitled to qualified immunity. Such an application of qualified immunity is consistent with this Court's standard of "objective reasonableness" that is "measured by reference to clearly established law" because a police officer should be deemed to be acting in

an objectively reasonable manner when he conscientiously follows the procedure prescribed by this Court in its stated preference for the use of warrants and in its establishment of the division of functions between magistrates and police officers.

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ARGUMENT

Petitioners ask this Court to adopt the rule that a police officer cannot be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only allegation made against the police officer is that he knew or should have known that the affidavit that he submitted to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed.[5] Petitioners base this request on two alternative grounds: (1) that a police officer in this situation should be absolutely immune from liability because the "special functions" performed by an officer in such an instance require a full exemption from liability; or (2) that a police officer

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[5]This proposed rule covers only those situations in which the police officer is allegedly mistaken in his belief that the facts submitted to the neutral and detached magistrate constituted probable cause. It would not apply in those situations in which the police officer allegedly misled the magistrate by information in the affidavit that the police officer knew was false or would have known was false except for his reckless disregard of the truth. *See United States v. Leon*, — U.S. —, 104 S.Ct. 3405, 3421 (1984).

in this situation should be qualifiedly immune from liability because it is *per se* reasonable in such an instance for the officer to submit an affidavit and application for arrest warrant to a neutral and detached magistrate for his review.

This Court has stated the policies underlying 42 U.S.C. § 1983 in a very broad way, indicating that these policies "include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann,* 436 U.S. 584, 590-91 (1978). *See also Burnett v. Grattan,* — U.S. —, 104 S.Ct. 2924, 2931 (1984). Despite these broadly stated policies, and although § 1983 has no immunities on its face, this Court has "consistently construed" that statute "as not intending wholesale revocation of the common-law immunity afforded government officials." *Procunier v. Navarette,* 434 U.S. 555, 561 (1978). By enacting this statute,

> Congress . . . expressed no intention to do away with the immunities afforded state officials at common law, and the Court consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981).

The Court's decisions have recognized two kinds of immunity defenses to § 1983 liability: absolute immunity and qualified immunity. *Imbler v. Pachtman,* 424 U.S. 409, 418-19 (1976). *See also Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Butz v. Economou,* 438 U.S. 478 (1978).[6]

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[6]Although the Court's decisions in *Harlow* and *Butz* deal with the question of the liability of federal officials who are

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Absolute immunity "bars a suit at the outset and frees the defendant official of any obligation to justify his actions," *Gray v. Bell,* 712 F.2d 490, 495-96 (D.C. Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 1593 (1984), if the "official's actions were within the scope of the immunity." *Imbler v. Pachtman,* 424 U.S. at 419 n.13. Qualified immunity, on the other hand, "protects an official from liability only if he can show that his actions did not contravene clearly established statutory or constitutional rights of which a reasonable person in his position should have known." *Gray v. Bell,* 712 F.2d at 496. *See Harlow v. Fitzgerald,* 457 U.S. at 2738-39.

Under either theory of immunity, a police officer should be immune from liability under 42 U.S.C. § 1983 for submitting allegedly legally deficient affidavits to a neutral and detached magistrate in an application for an arrest warrant. Accordingly, Part I of this argument will examine the question of the police officer's absolute immunity in this situation and will show that absolute immunity should be applied to the police officer because: (1) common law immunity existed for the function being performed by the police officer in this instance; and (2) strong policy reasons support granting this absolute immunity. Part II of this argument will examine the ques-

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sued pursuant to *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), rather than the question of the liability of state officials who are sued pursuant to 42 U.S.C. § 1983, the Court has made it clear that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz v. Economou,* 438 U.S. at 504. *See also Harlow v. Fitzgerald,* 457 U.S. at 818 n.30.

tion of the police officer's qualified immunity and will show that a police officer in this situation acted in a *per se* objectively reasonable manner and therefore is entitled to qualified immunity.

I.

A Police Officer Should Have Absolute Immunity From Liability Under 42 U.S.C. § 1983 When His Only Alleged Misconduct Is That He Submitted An Allegedly Insufficient Affidavit To A Magistrate In An Application For An Arrest Warrant.

The Court has recognized that "there are some officials whose special functions require a full exemption from liability." *Butz v. Economou,* 438 U.S. at 508. *See also Briscoe v. LaHue,* 460 U.S. 325 (1983); *Harlow v. Fitzgerald,* 457 U.S. at 810-11. These officials are granted such an absolute immunity "not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz v. Economou,* 438 U.S. at 511. Accordingly, the Court has held that absolute immunity applies to judges for their judicial acts, *Stump v. Sparkman,* 435 U.S. 349, 359 (1978); *Pierson v. Ray,* 386 U.S. 547, 554-55 (1967);[7] to legislators for their legislative activities, *Tenney v. Brandhove,* 341 U.S. 367 (1951); to prosecutors for their prosecutorial functions of initiating prosecution and presenting the State's case,

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[7]Because the role of federal agency hearing examiners or administrative law judges is "functionally comparable" to that of a judge, such officials are also absolutely immune from liability for their judicial acts. *Butz v. Economou,* 438 U.S. at 513-14.

Imbler v. Pachtman, 424 U.S. at 430-31;[8] to the President of the United States "for acts within the 'outer perimeter' of his official responsibility," *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); and to witnesses at trials. *Briscoe v. LaHue*, 460 U.S. at 342-45.

In determining whether the special functions and responsibilities of certain officials qualify them for absolute immunity, the Court has considered whether the proposed immunity meets certain criteria. First, the Court has considered the question of whether the official or the function was "historically accorded" immunity. *Imbler v. Pachtman*, 424 U.S. at 421. If such historical immunity existed, then the Court has considered whether policies and interests support the continuation of the immunity. *City of Newport v. Facts Concerts, Inc.*, 453 U.S. at 259; *Imbler v. Pachtman*, 424 U.S. at 421. After examining these criteria as they apply in the instant case, it will become clear that a police officer should be accorded absolute immunity for his decision to submit an allegedly insufficient affidavit to a neutral and detached magistrate in an application for an arrest warrant.

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[8]Federal agency officials performing functions "analogous to those of a prosecutor," *i.e.*, deciding to initiate proceedings against an individual or corporation, or conducting a trial and presenting evidence on the record to the trier of fact, are also absolutely immune from liability for those functions. *Butz v. Economou*, 438 U.S. at 515-17.

In addition, an attorney employed by the Department of Social Services has been held to be absolutely immune from liability for her act of requesting an arrest warrant from a Judge, because her position and responsibility were similar to those of a prosecuting attorney. *Walden v. Wishengrad*, 745 F.2d 149 (2nd Cir. 1984).

A. The Function Performed By The Police Officer In Submitting An Allegedly Insufficient Affidavit To A Magistrate In An Application For An Arrest Warrant Historically Has Been Accorded Absolute Immunity.

The function performed by the police officer in this matter is the common law function of the prosecuting complainant: placing a complaint about an individual before the magistrate and asking the magistrate to act by issuing a warrant for the individual's arrest. Historically, this function of applying to a magistrate for an arrest warrant was accorded immunity from tort actions at common law if the only allegation of misconduct was that the application was legally insufficient. The "main proposition" at common law was that a prosecuting complainant "is protected by a judicial decision, though erroneous, that the facts alleged by him support the criminal charge . . . ." 21 A.L.R. 2d 643, 662.

> Where a person in good faith lays his complaint before a justice of the peace and calls upon him to act and the justice concludes to issue a warrant, the complainant cannot be made answerable to the accused however mistakenly or erroneously the justice may have acted.

Id., quoting Brueckner v. Frederick, 109 Mo. App. 614, 83 S.W. 775 (1904). *See Madison v. Manter,* 441 F.2d 537, 538 (1st Cir. 1971) ("a private citizen who seeks a warrant

[with an insufficient affidavit] would not be liable"), and cases cited therein. The basis for this rule stems from the injustice of holding the complainant liable because of a judge's mistake; such an action "would not only be grossly unjust but would also be highly injurious to the public interest." 21 A.L.R. 2d 639, 642, *quoting Gogue v. MacDonald*, 35 Cal. 2d 482, 218 P.2d 542 (1950). *See Madison v. Manter*, 441 F.2d at 538 ("any stricter rule would discourage proper action"). This follows from the long-standing common law rule regarding false imprisonment, that "[i]n criminal cases the party who prefers the charge is not liable unless it is made maliciously . . . ; for the law encourages the exposure of crime." M. BIGELOW, LEADING CASES ON THE LAW OF TORTS, 280 (1875). *See also* J. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW, § 211 (1889) (complainant is not liable if he states the facts to the proper officers and the officers act upon their independent judgment).[9]

Accordingly, under common law principles, a complainant could not be found liable for damages resulting

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[9]This same principle holds true for the tort of malicious prosecution. J. BISHOP, COMMENTARIES OF THE NON-CONTRACT LAW, at 230. Moreover, in a tort action for malicious prosecution, it is a defense that the complainant sought the advice of professional counsel, *i.e.*, a practicing lawyer, "upon the question whether the facts within his knowledge are such as to justify a complaint," and acted "*bona fide* upon the advice given," however erroneous. M. BIGELOW, ELEMENTS OF THE LAW OF TORTS, 83 (1878). *See also* J. BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW, at § 236.

Moreover, the rule "in most jurisdictions" is that "the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure." *Massachusetts v. Sheppard*, — U.S. —, 104 S.Ct. 3424, 3429 (1984).

from an arrest made with a warrant if the only allegation made against the complainant was that he submitted an affidavit with insufficient facts to establish probable cause to a magistrate who erroneously issued the warrant. Because this Court's immunity analysis rests on "functional categories, not on the status of the defendant," *Briscoe v. LaHue*, 460 U.S. at 342 (footnote omitted), the immunity allowed to lay complainants should also apply to police officer complainants.[10] The function performed by a complainant is the same whether the complainant is a private citizen or a police officer: to bring the facts before the judicial officer for his independent determination of whether probable cause exists and whether the warrant should issue. Therefore, the same immunity should apply to both the private citizen and the police officer when they act in the role of complainant.

In addition, the function performed by the police officer in this situation is very similar to the function performed by a prosecuting attorney in initiating a criminal prosecution, which function is accorded absolute immunity from civil liability. *See Imbler v. Pachtman*, 424 U.S. at 427. The police officer's decision to seek an arrest warrant from a magistrate is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution: both are major decisions regarding whether an individual will face criminal charges and will have to undergo certain criminal proceedings. Once the police offi-

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[10]In *Briscoe*, the Court rejected making a distinction between immunity for ordinary witnesses and immunity for police officer witnesses. The Court found that "considerations of public policy" supported immunity for police officer witnesses. *Briscoe v. LaHue*, 460 U.S. at 342.

cer obtains an arrest warrant for an individual, just as once the prosecutor decides to initiate criminal prosecution, the individual is made a part of the criminal judicial process. Both the police officer and the prosecutor "exercise a discretionary judgment on the basis of evidence presented to them." *Id.* at 423 n.20. Accordingly, the absolute immunity available to the prosecutor at common law for his decision to initiate a prosecution, *id.* at 421-23, should be applied to a police officer who performs the similar function of initiating criminal proceedings by seeking an arrest warrant from a magistrate. *See Butz v. Economou,* 438 U.S. at 515 (absolute immunity applies to federal agency officials who perform similar functions to those of a prosecutor by initiating agency proceedings against an individual or corporation).

Therefore, because the function performed by a police officer in applying to a neutral and detached magistrate for an arrest warrant was historically accorded immunity at common law, both as a function performed by a prosecuting complainant and as a function performed by a prosecuting attorney, a police officer who performs this function should be granted absolute immunity.

B. Important Policies And Interests Support Providing Absolute Immunity To A Police Officer Who Applies To A Magistrate For An Arrest Warrant.

This Court has recognized that granting absolute immunity to a public official "may impose a regrettable cost on individuals whose rights have been violated." *Nixon v. Fitzgerald,* 457 U.S. at 754 n.37. *See also Butz v.*

Economou, 438 U.S. at 504-05. On the other hand, the Court has recognized that there are instances in which the alternative of qualifying an official's immunity "would disserve the broader public interest." *Imbler v. Pachtman,* 424 U.S. at 427. In attempting to resolve these conflicting interests, the Court has stated its agreement with Judge Learned Hand:

> "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

Imbler v. Pachtman, 424 U.S. at 428, *quoting Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

Thus, in determining whether absolute immunity should be applied to a police officer who submitted an allegedly insufficient affidavit to a magistrate in an application for an arrest warrant, the cost on the allegedly wronged individual must be weighed against the broader public interest. Because in this situation the public interest in granting the immunity to the police officer so outweighs the cost to an individual in being barred from damages recovery under § 1983, the police officer should be granted absolute immunity.

1. Traditional policy reasons supporting absolute immunity apply to a police officer performing this function.

In its decision to apply absolute immunity to certain prosecutorial, judicial, legislative, presidential, and wit-

ness functions, the Court has cited several policy reasons to support the application of such immunity to the functions in question. The officials performing these functions are involved in "cases that arouse the most intense feelings in the litigants," *Pierson v. Ray,* 386 U.S. at 554, and in controversies likely to be so intense that they "are not easily capped by a judicial decree." *Butz v. Economou,* 438 U.S. at 512. Resentment at the official decisions in such matters could be expected to erupt into frequent retaliatory litigation, *Imbler v. Pachtman,* 424 U.S. at 425-26, and the officials could find themselves hounded by litigation charging malice or corruption. *Pierson v. Ray,* 386 U.S. at 554. It is just in such intense situations, however, "that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office," *Nixon v. Fitzgerald,* 457 U.S. at 752, *quoting Ferri v. Ackerman,* 444 U.S. 193, 203 (1979), and to exercise the "independence of judgment required by his public trust." *Imbler v. Pachtman,* 424 U.S. at 423. Moreover, facing the possibility of liability for damages "may render an official unduly cautious in the discharge of his official duties." *Nixon v. Fitzgerald,* 457 U.S. at 752-53 n.32. It is essential that these officials be assured that they "can perform their respective functions without harassment or intimidation." *Butz v. Economou,* 438 U.S. at 512.

These same policy reasons apply to the situation in which a police officer applies to a neutral and detached magistrate for an arrest warrant. This is the exact type of official action that arouses the "most intense feelings" in the individuals involved, feelings not "easily capped" by the magistrate's decision that probable cause exists

and that an arrest warrant should issue. Because police officers are on the "front line" and often are more open to public exposure and criticism than even judges and prosecutors, their decisions regarding seeking arrest warrants are even more likely to arouse emotions and to erupt into retaliatory litigation than the decisions of those other public officers. It is just because of the explosive nature of their work in seeking warrants, however, that police officers require the protection offered by absolute immunity to allow them to deal fearlessly with the public pressures and emotions and to meet the public trust reposed in them. A police officer must be able to apply to a neutral and detached magistrate whenever, in his independent judgment, such application is warranted; he should not be intimidated by the fear that he could face civil liability if the magistrate's approval of his warrant request turns out to be erroneous. If the police officer does not receive immunity in such instances, it is likely that "harassment by unfounded litigation" may "cause a deflection of [his] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler v. Pachtman,* 424 U.S. at 423.

Moreover, providing such immunity to a police officer will not leave allegedly wrong individuals without sufficient protection. "The presence of alternative remedies [to civil liability] has played an important role" in the Court's decisions to provide absolute immunity. *Nixon v. Fitzgerald,* 457 U.S. at 757 n.38. *See also Parratt v. Taylor,* 451 U.S. 527 (1981). These "alternative" remedies include impeachment of the President and federal judges, removal of legislators from office by a vote of

their colleagues, and other formal and informal checks on Presidential action. *Nixon v. Fitzgerald,* 457 U.S. at 757 and 757 n.38. As to the participants in the judicial process who have been granted such functional immunity, *i.e.,* judges, prosecutors, and witnesses, "the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz v. Economou,* 438 U.S. at 512. For example, a judge's errors may be corrected on appeal, *Pierson v. Ray,* 386 U.S. at 554, while prosecutors' actions often receive close and direct judicial scrutiny, *Gray v. Bell,* 712 F.2d at 501, as well as monitoring by adversaries in the courtroom and restraint by professional obligations. *Butz v. Economou,* 438 U.S. at 512. "Witnesses are, of course, subject to the rigors of cross-examination," *id.,* and all three actors in the judicial process are subject to the penalties of the criminal law. *Id.; Imbler v. Pachtman,* 424 U.S. at 429.

These same considerations apply to a police officer who is applying to a magistrate for an arrest warrant. As soon as the police officer applies to a magistrate for an arrest warrant, the police officer becomes part of the judicial process, with all of the rigors and safeguards that attach to the process. His affidavit and application for arrest warrant are subject to judicial scrutiny and to rejection if they do not meet required standards. Even if an insufficient application is approved by the magistrate and an arrest warrant is issued, the error is still subject to review and correction by other actors within the judicial process: the grand jury, prosecuting attor-

neys, other trial or appellate judges, a jury.[11] In addition, other remedies are available to an individual who alleges that he has been wronged by a police officer's application for an arrest warrant: in certain situations criminal prosecution may be available, as may civil liability in state tort actions.[12] Thus, the numerous safeguards built into the system and the alternative remedies available do reduce the need for private damage actions in this area and provide sufficient protection to allegedly wronged individuals.

Accordingly, the traditional policies requiring absolute immunity to protect an official from the explosive

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[11]This consideration is apparent in this case. Mr. and Mrs. Briggs were arrested on a warrant that they allege lacked probable cause; the grand jury returned a no true bill regarding them. Thus, any damage incurred by Mr. and Mrs. Briggs as the result of this allegedly unlawful arrest was minimized by the protections inherent in the judicial system.

[12]In the instant case, the Court of Appeals expressed concern that:

> [t]he absolute judicial immunity of the magistrate precludes suit against him or her. Were we to permit the interposition of the magistrate between the police officer and the warrant to immunize the negligence of the police officer, such plaintiffs would be remediless.

Briggs v. Malley, 748 F.2d at 720. Although Mr. and Mrs. Briggs may be "remediless" regarding recovering damages under 42 U.S.C. § 1983 if absolute immunity is applied to Trooper Malley in this case, they certainly are not "remediless" in the context used by this Court. As the Court has noted:

> It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But . . . it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong.

Nixon v. Fitzgerald, 457 U.S. at 754 n.37.

feelings generated by his official actions and to allow him to act without intimidation and harassment, and the presence of the safeguards of the judicial process and alternative remedies to allow sufficient protection to an individual, both point to the soundness of applying absolute immunity to a police officer who submits allegedly insufficient affidavits to a magistrate in an application for an arrest warrant.

2. Applying absolute immunity to a police officer in this situation will serve the policy reasons inherent in this Court's preference for the use of arrest warrants and the established division of functions between magistrates and police officers.

This Court has expressed a "strong preference for warrants" on which to base arrests or searches. *United States v. Leon*, — U.S. —, 104 S.Ct. 3405, 3417 (1984).[13] This preference for warrants stems from the Court's belief that "[a]n arrest without a warrant bypasses the safeguards provided by an objective determination of probable cause," *Beck v. Ohio*, 379 U.S. 89, 96 (1964), because "[t]he war-

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[13]Petitioners disagree with the court below and with respondents regarding the conclusiveness of the Court's ruling in *Leon* regarding the question of a police officer's liability under 42 U.S.C. § 1983. Although we recognize the importance of *Leon* in defining boundaries for the exclusionary rule, and we draw guidance from it concerning the Court's view of the relationship between magistrates and police officers, we do not believe that a case deciding a question of whether evidence should be excluded in a criminal proceeding should be dispositive of a question regarding the civil liability of a police officer under 42 U.S.C. § 1983. For that reason, while recognizing that *Leon* provides guidance for criminal proceedings, we believe that this Court's traditional analysis of § 1983 liability is much more revelant to this case.

rant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime." *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972). This "objective determination" and "independent assurance" of probable cause is provided by the neutral and detached magistrate to whom the application for arrest or search warrant is made. *Id.* Therefore, "[t]o implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). The "classic statement" of this principle, *id.*, is found in *Johnson v. United States*, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14 (footnote omitted). *See United States v. Leon*, 104 S.Ct. at 3416-17.

This policy decision of the Court to prefer that arrests and searches be conducted pursuant to warrants issued by neutral and detached magistrates recognizes that there is a "reasonable division of functions" between police officers and magistrates, *Baker v. McCollan*, 443 U.S. 137, 145 (1979): the police officer's function is primarily one of ferreting out crime, while the magistrate's

function is primarily one of determining the existence of probable cause and issuing the appropriate warrants. *See United States v. Leon*, 104 S.Ct. at 3420 ("It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment."). Using "terms that apply equally to arrests," the Court has "described the 'very heart of the Fourth Amendment directive' as a requirement that 'where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation.'" *Gerstein v. Pugh*, 420 U.S. at 113 n.12, *quoting United States v. United States District Court*, 407 U.S. 297, 316 (197_).

Underlying the Court's preference for warrants and its division of functions between magistrates and police officers in the warrant process is the Court's belief that the magistrate is, as a general rule, more qualified than the police officer to make the dispassionate and objective determination of whether probable cause exists for an arrest or a search. This qualification of the magistrate is based upon the requirement that a magistrate must be "neutral and detached," a standard that requires "severance and disengagement from activities of law enforcement." *Shadwick v. City of Tampa*, 407 U.S. at 349. *See United States v. Leon*, 104 S.Ct. at 3418. This neutrality and detachment is essential, because

> "the informed and deliberate determinations of magistrates empowered to issue warrants as to what

> searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Johnson v. United States, 333 U.S at 14 n.3, *quoting United States v. Lefkowitz,* 285 U.S. 452, 464 (1932). In addition to this requirement of neutrality and detachment, a magistrate is required to be "capable of determining whether probable cause exists for the requested arrest or search." *Shadwick v. City of Tampa,* 407 U.S. at 350.[14] Accordingly, because the magistrate is required to meet these two standards, obtaining "magistrate review of the factual justification prior to any arrest" assures the "[m]aximum protection of individual rights." *Gerstein v. Pugh,* 420 U.S. at 113.

Providing that a police officer, who, in good faith, seeks the magistrate's review of the factual justification prior to any arrest and receives the magistrate's approval, is absolutely immune from potential liability under 42 U.S.C. § 1983 for damages resulting from the arrest even though it later is determined that the magistrate's approval was erroneous, not only supports but is entirely consistent with this Court's policy to prefer and encourage such magisterial review. By applying to a magistrate

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[14]Although it is not essential that a magistrate be a lawyer or a judge, *Shadwick v. City of Tampa,* 407 U.S. at 349, 353, a judge or a lawyer normally will provide "the most desirable review of warrant requests." *Id.* at 353. In the instant case, the reviewing magistrate is a Judge of the Rhode Island District Court.

for approval of his proposed arrest warrant, a police officer is conducting himself exactly as this Court has strongly indicated that it wants him to conduct himself. In other words, the police officer has approached the "single-minded protector" of an individual's constitutional rights, *Madison v. Manter,* 441 F.2d at 539, for a review of the officer's factual information and for an independent determination of whether probable cause exists for the arrest. The police officer should be required to do nothing more, for he has sought and followed expert advice in the manner prescribed by this Court, thereby assuring the maximum protection of individual rights.

If the Court of Appeals' decision is left undisturbed, and the police officer can face civil liability for obtaining from a neutral and detached magistrate an arrest warrant that is later determined to be defective for lack of probable cause, this Court's policy to prefer and encourage such magisterial review and to divide the functions in the arrest process between the magistrate and the police officer will be severely undermined. First, such a policy allowing liability totally ignores the reasons why this Court has given the magistrate, rather than the police officer, the primary responsibility for reviewing warrant applications: the magistrate has the better ability to be neutral and detached, because he is independent of the law enforcement activities that place the police officer in the midst of the subjective fray of ferreting out crime. The police officer is not expected to be able to be as objective as the magistrate, and neither should he be, for his function is to be zealous, rather than neutral, and to be actively competitive in fighting crime, rather than contemplatively detached in reviewing factual allegations.

The Court of Appeals' decision, however, requires the police officer to assume this contemplative detachment and neturality of the magistrate, for it requires the police officer to make an accurate determination of the existence of probable cause before the police officer applies to the magistrate for an arrest warrant.[15]

In addition, such a policy allowing police officer liability in this situation ignores this Court's premise that the magistrate is more qualified than the police officer to make a probable cause determination. The Court of Appeals' decision, in fact, reverses this premise, for it requires the police officer to assume a role even more skilled in this area than the magistrate. From now on, according to the Court of Appeals, a police officer must be able to accurately identify the presence or absence

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[15]The Court of Appeals' decision does in fact require this pre-magistrate accurate determination of probable cause by the police officer, because under the Court of Appeals' standard the police officer could face civil liability if he submits an affidavit and warrant to a magistrate, and the magistrate decides that probable cause exists and issues the warrant, but a reviewing court determines that the magistrate was erroneous and that the affidavit did not establish probable cause. Thus, if the police officer is wrong in his legal evaluation of the sufficiency of the facts in the affidavit to establish probable cause, he could face liability.

It is an illusion to argue that the police officer is protected if the question of the sufficiency of the facts in the affidavit falls within the Court of Appeals' "grey area" appropriate for judicial determination. Even if a police officer believes that his case fits within the "grey area" and should be submitted to a magistrate, he still could face liability if a reviewing court disagrees with his assessment that the case fits within the "grey area." It will be almost impossible for a police officer to define the subjective term "grey area" in a way that will help him in his decision-making process in evaluating probable cause.

of probable cause, even though such identification is unable to be made accurately by a neutral and detached magistrate who has been trained in much greater detail than the police officer to make such identification. Such a standard of requiring sounder legal reasoning from a police officer than from a magistrate is ludicrous and completely at odds with the policy and reasoning of this Court.[16] *See United States v. Barker,* 547 F.2d 940, 947 (D.C. Cir. 1976) ("It is neither fair nor practical to hold such officials to a standard of care exceeding that exercised by a judge.").

Moreover, such a policy of liability not only would do nothing to further the Court's policy of encouraging the use of warrants for arrests but would, in fact, tend to discourage such use of warrants. As pointed out in the Brief Amici Curiae of Americans for Effective Law Enforcement, Inc., if a police officer is designated as the "final arbiter" of probable cause, he may be encouraged to forgo the warrant process and to arrest without a warrant, especially if he believes that the situation falls within one of the warrant exceptions. Brief, pp. 6-7. *See also Illinois v. Gates,* — U.S. —, 103 S.Ct. 2317, 2331 (1983). The Court of Appeals' rule gives the police officer no incentive to seek review of a warrant application by a magistrate, for such magisterial review not only

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[16]In fact, if the police officer is required in this way to assume a role even greater than the role of the magistrate, and to perform the magistrate's function even more accurately than the magistrate is required to do, then the police officer should be gra ted the absolute immunity protection that is granted to an official performing such a judicial function. *See Butz v. Economou,* 438 U.S. at 513-14; *Pierson v. Ray,* 386 U.S. at 554-55.

might not help the police officer in his determination regarding the existence of probable cause but also could serve to mislead the police officer into believing that probable cause exists when in fact it does not.

Therefore, because the Court of Appeals' rule is so at odds with this Court's policy of preferring and encouraging police officers to seek warrants from neutral and detached magistrates, and because granting immunity to police officers in this situation will support and is entirely consistent with this Court's policy, the Court should grant police officers absolute immunity in this situation.

II.

A Police Officer Who In Good Faith Applies To A Magistrate For An Arrest Warrant Acts In An Objectively Reasonable Manner And Is Entitled To Qualified Immunity.

This Court's most recent decision regarding the standard by which to judge the qualified immunity available to government officials is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which the Court held "that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This standard is one of "objective reasonableness . . . measured by reference to clearly established law." *Id.* (footnote omitted).

The Court of Appeals decided that the *Harlow* standard "should be understood to prohibit conduct which is

'constitutionally negligent.'" *Briggs v. Malley,* 748 F.2d at 718 (Pet. App. 16). In the situation where a police officer submits affidavits in support of an application for an arrest warrant to a judge, the Court defined "constitutionally negligent" to be that situation in which the officer seeks judicial determination of sufficiency of an affidavit if the officer should have known that the facts recited in the affidavit did not constitute probable cause. *Id.* at 721.

Such a policy, while ostensibly relying on the *Harlow* standard, actually conflicts with the basic principles enunciated in *Harlow.* The *Harlow* Court was concerned with defining the standard for qualified immunity as one of "objective reasonableness" that would be "measured by reference to clearly established law." *Harlow v. Fitzgerald,* 457 U.S. at 818. The Court of Appeals' decision, however, is inconsistent with the *Harlow* standard, for it requires in every instance a speculative determination of what the police officer should have known regarding the existence of probable cause in the affidavits submitted to the magistrate. Only by a thorough case-by-case analysis will a court be able to begin to meet the requirements of this standard, and even then it will be a difficult task to accomplish, because "probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 103 S.Ct. at 2328. *See United States v. Leon,* 104 S.Ct. at 3417 ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause . . ."). Such a vague and uncertain standard should not be acceptable under the *Harlow* "objective reasonableness" standard.

On the other hand, in the situation in which a police officer applies to a magistrate for an arrest warrant, and the only allegation of misconduct against the police officer is that he knew or should have known that the facts stated in his affidavit were insufficient to establish probable cause, it should be clear that the police officer acted in an "objectively reasonable" fashion in accordance with "clearly established law." As shown *supra* at pp. 28-38, this Court had made its preference for the use of arrest warrants very clear and has repeatedly emphasized that it is the magistrate's, rather than the police officer's, role to determine whether probable cause for arrest exists. If a police officer conscientiously follows the procedure required by this Court, and submits his application for an arrest warrant to a neutral and detached magistrate for review, he should be found to be "objectively reasonable" in his actions, and therefore immune from civil liability under 42 U.S.C. § 1983, despite any allegation that he knew or should have known that the affidavits that he submitted were legally deficient. Even if it later is determined that the magistrate was wrong in his decision to issue the warrant because probable cause was lacking, the police officer still should be held to be objectively reasonable in his behavior, for "[a]n error of constitutional dimensions may have been committed . . . , but it was the judge, not the police officer[ ], who made the critical mistake." *Massachusetts v. Sheppard*, — U.S. —, 104 S.Ct. 3424, 3429 (1984).

Therefore, according to the "objectively reasonable" standard for qualified immunity, a police officer should be immune from liability when he acts objectively reasonably by submitting an affidavit to a neutral and detached magistrate in an application for an arrest warrant, even though it is alleged that he knew or should have known

that the affidavit was legally insufficient to establish probable cause to arrest.

CONCLUSION

Because of the legal and policy considerations outlined above, the Court of Appeals was incorrect in holding that a police officer is constitutionally negligent, and therefore subject to liability under 42 U.S.C. § 1983, in those situations in which the officer should have known that the facts recited in an affidavit submitted to a magistrate in an application for an arrest warrant did not constitute probable cause. Petitioners therefore request that this Court reverse the decision of the Court of Appeals and adopt the rule that a police officer cannot be held liable under 42 U.S.C. § 1983 for damages resulting from an arrest, when the only allegation made against the police officer is that he knew or should have known that the affidavit that he submited to a neutral and detached magistrate in an application for an arrest warrant lacked sufficient facts to establish probable cause for the arrest, even though the neutral and detached magistrate issued the arrest warrant based upon his finding that probable cause for arrest existed.

Respectfully submited,

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